17-0428

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LOUIS FLORES,

Appellant-Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent-Defendant.

BRIEF OF APPELLANT LOUIS FLORES

Louis Flores
34-21 77th Street, Apt. 406
Jackson Heights, New York 11372
Phone : (929) 279-2292
louisflores@louisflores.com

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

III. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), (a)(6)(E)(iii) ; 28 U.S.C. § 1331 ; and 5 U.S.C. §§ 701-706. The District Court (Azrack, J.) granted summary judgment to Defendant-Respondent United States Department of Justice ("DOJ") and denied partial summary judgment and other relief to Plaintiff-Appellant Louis Flores ("Flores") in an Order dated 18 January 2017 with a Judgment filed on 19 January 2017. Plaintiff timely filed a Notice of Appeal from that final Judgment disposing of the entire action on 10 February 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

IV. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1/. May the Government comply with FOIA at its discretion ?

2/. May the Government refuse to confirm or deny the existence of guidelines, procedures, policies, and/or protocols for the prosecution of the activists ?

3/. Does legal analysis of the prosecution of activists become the Government's "working law" and thus must be disclosed under FOIA when (i) that analysis describes the process that Agencies must follow in

order for their actions to be legal and (ii) executive officials have repeatedly stressed the legality of activists engaged in activism ?

4/. Does substantial public interest in guaranteeing the press's and the citizen's rights to First Amendment-protected activities compel the Government to disclose its guidelines, procedures, policies, and/or protocols for the prosecution of the activists ?

V. STATEMENT OF THE CASE

This appeal raises significant questions surrounding the public's right under FOIA to access the Government's legal analysis of the prosecution of activists. Because the American form of Government allows for citizen participation in setting public policy, in civic demonstration for legal reforms, and for protesting unjust laws, as the case may be, as examples, Plaintiff-Appellant submitted the a request (the "First FOIA Request") under the Freedom of Informaiton Act ("FOIA"), seeking Defendant's-Respondent's guidelines, procedures, policies, and/or protocols for the prosecution of the activists.

For two years, the DOJ refused to process the First FOIA Request, despite communications had by Plaintiff-Appellant and the DOJ. Plaintiff-Appellant had to launch an activism campaign against a former U.S. Attorney General in a failed attempt to pressure the DOJ to process the

First FOIA Request. Briefly, Plaintiff-Appellant was represented by Counsel, who appealed the DOJ's constructive denial of the First FOIA Request. All these actions were fuitless : the DOJ refused to comply with FOIA.

The DOJ only began to produce at least some documents after Plaintiff-Appellant commenced civil litigation in the Eastern District of New York on 05 May 2015. In the beginning, the DOJ's responses were largely in the form of a red herring (the "First FOIA Response" or the "Red Herring Response"). (Dkt. No. 26, Ex. F). Later, the DOJ began to produce some responsive documents. (Dkt. No. 26, Ex. G). Some of those documents referred to the existence or likely existence of still yet other documents. Those other documents were never produced, however. For no document not produced did the DOJ ever claim an Exemption, with the exception of documents withheld from the Red Herring Response due to the Privacy Act rights of Lt. **DANIEL CHOI**, one of the activists named in the First FOIA Request. Because the DOJ never claimed an Exemption for the other documents referenced to exist or likely to exist, the DOJ waived its right to claim an Exemption for the other documents. Yet, the District Court never compelled the DOJ to produce documents that were shown to

exist or that were likely to exist, despite demands made by Plaintiff-Appellant.

VI. STATEMENT OF THE FACTS

A. THE GOVERNMENT'S DISCLOSURES

Senior U.S. Government officials have publicly affirmed the rights of citizens to engage in activism. After a St. Louis County grand jury voted not to file charges against a police officer in the shooting death of **MICHAEL BROWN**, then-President **BARACK OBAMA** delivered remarks, directing law enforcement officials to allow activists to engage in peaceful protests, adding, in part : "I also appeal to the law enforcement officials in Ferguson and the region to show care and restraint in managing peaceful protests that may occur."[1/] After protesters working in solidarity with Ferguson activists interrupted an Atlanta speech by then-U.S. Attorney General **ERIC HOLDER**, the nation's top Federal prosecutor at the time said, in part : "What we saw there was a genuine expression of concern and involvement. And it is through that level of involvement, that level of concern and I hope a level of perseverance and commitment, that change

---

1/ *See* Barack Obama, *President Obama Delivers a Statement on the Ferguson Grand Jury's Decision*, White House (Nov. 24, 2014), https://www.whitehouse.gov/blog/2014/11/24/president-obama-delivers-statement-ferguson-grand-jurys-decision.

ultimately will come."[2/] In those statements, the former U.S. President and the former U.S. Attorney General assured the public that citizens could engage in activism. Nonetheless, the Government has refused to disclose the actual legal analysis supporting when activism becomes a crime that the DOJ prosecutes.

With this appeal, this Court must confront the contradictory situation created by the Government : (a) the top-most U.S. Government officials have made public statements declaring that citizens have a right to engage in activism ; (b) DOJ has prosecuted activists ; and (c) the Government refuses to disclose all of the records that indicate when the DOJ can prosecute activists, despite citizens having a right to participate in their own Government, particularly under activists' First Amendment-protected political organizing that are enshrined as freedoms by the rights to free speech and free association. *See also* U.S. Const. amend. I.

B. THE FIRST FOIA REQUEST

On 30 April 2013, the First FOIA Request was sent by Plaintiff-Appellant to an address provided by the DOJ by Certified Mail — Return Receipt Requested, seeking records about the Government's prosecution

---

[2/] *See* Holly Yan and Catherine E. Shoichet, *Ferguson fallout : Protesters interrupt Holder's speech*, CNN (Dec. 2, 2015), http://www.cnn.com/2014/12/01/us/ferguson-up-to-speed/.

of activists. (Dkt. No. 12 at Ex. D to Ex. I to Ex. C). The First FOIA Request was physically received and signed for by an agent of the DOJ on 06 May 2013. (Dkt. No. 12 at Ex. II to Ex. C). As a courtesy, Plaintiff e-mailed on 30 April 2013, the First FOIA Request to DOJ officials, including William Miller, a public information officer with the U.S. Attorney's Office for the District of Columbia ("Miller"). (Flores Decl., Ex. JJ). On 01 May 2013, a DOJ official acknowledged receipt by return e-mail to Plaintiff of Plaintiff's 30 April 2013 e-mail transmitting the First FOIA Request. (Flores Decl., Ex. RR).

Plaintiff made numerous attempts to communicate with the Executive Office for United States Attorneys ("EOUSA"), principally but not exclusively with **SANJAY SOLA**, a paralegal with the EOUSA, including, but not limited to, on 14 May 2013 ; 05 June 2013 ; 18 June 2013 ; 05 July 2013 ; 08 July 2013 ; 09 July 2013 ; 20 September 2013 ; and 17 October 2013, to obtain a response to the Request. When no response was ever received, Plaintiff engaged counsel to prepare an appeal of the DOJ's constructive denial of the Request. (Dkt. No. 15, ¶ 5). On 06 December 2013, the law firm of Willkie Farr & Gallagher LLP, former counsel to Plaintiff (the "Counsel"), submitted an Appeal of Constructive Denial of Freedom of Information Act Request ("the Appeal") to the Office of

Information Policy of the DOJ (the "OIP"). (Dkt. No. 15, ¶ 6). After instances of communication between Counsel and the DOJ, the OIP replied to Counsel on 20 May 2014, informing Counsel that the Request was being remanded by the OIP to the EOUSA "for a search for responsive records," adding that, "If your client is dissatisfied with my action on your appeal, the Freedom of Information Act permits him to file a lawsuit in federal district court in accordance with 5 U.S.C. § 522(a)(4)(B)." (Dkt. No. 15, ¶ 7). For over two years, none of the DOJ components with which communication had been had released any responsive records or explained why responsive records were being withheld, each an act of bad faith. (Dkt. No. 15, ¶ 8). Not even after Plaintiff-Appellant began an activism campaign against then U.S. Attorney General Holder did the DOJ ever release any records. (Dkt. No. 15, ¶¶ 56-7).

C. THE DECISION BELOW

Having reached the limits of patience, having exhausted adminitrative remedies, and having nothing to show for an activism campaign, Plaintiff-Appellant commenced civil litigation in the District Court, challenging the DOJ's deliberate failure to comply with FOIA. The Chief Magistrate Judge issued a Report and Recommendation that was flawed. (Dkt. No. 48). Plaintiff-Appellant filed an Objection to the Report

and Recommendation that largely forms the basis of this Appeal. (Dkt. No. 50). The District Court denied Plaintiff's-Appellant's motions for partial summary judgment and sanctions. (Dkt. No. 58).

The District Court adopted the Report and Recommendation of the Chief Magistrate Judge "in its entirety." (Dkt. No. 58 at 1). In doing so, the District Court found that, "The Court has considered all of [P]laintiff's objections and, and after conducting a de novo review of the record, affirms and adopts Judge Mann's thorough and well-reasoned Report in its entirety as the opinion of the Court. (footnote ommitted). To the extent that [P]laintiff raises arguments in his objections that were not explicitly addressed in Judge Mann's Report, those objections are meritless for, inter alia, the reasons stated in the [G]overnment's response to [P]laintiff's objections." (Dkt. No. 58 at 2).

VII. SUMMARY OF THE ARGUMENT

Flores filed two FOIA requests about the prosecution of activists, only one of which the District Court would consider : The First FOIA Request. The First FOIA Request mentioned the Government's prosecution of Lt. Choi, a military officer discharged due to his sexual orientation, who was a visible leader in the activist campaign to overturn the U.S. Armed Services' formerly discriminatory policy known as, "Don't

Ask, Don't Tell." *See e.g.*, (Dkt. No. 12 at Ex. I to Ex. C at 1). (Dkt. No. 15 at 2). (Flores Ex., Ex. L, ¶ 5). Other activists mentioned by name or group in the First FOIA Request included :

- **AARON SWARTZ**. *See e.g.*, (Dkt. No. 12 at Ex. I to Ex. C at 2). (Dkt. No. 15 at 5). (Flores Ex., Ex. L, ¶ 10).
- PFC **CHELSEA MANNING**. *See e.g.*, (Dkt. No. 12 at Ex. I to Ex. C at 2). (Dkt. No. 15 at 9). (Flores Ex., Ex. L, ¶ 25).
- HIV/AIDS activists arrested in Washington, D.C. *See e.g.*, (Dkt. No. 12 at Ex. I to Ex. C at 6). (Dkt. No. 15 at 10). (Flores Ex., Ex. L, ¶ 26).
- Activists from Chicago and Minneapolis (the 'Midwest peace activists' or the 'Midwest anti-war activists'). *See e.g.*, (Dkt. No. 12 at Ex. I to Ex. C at 7). (Dkt. No. 15 at 11). (Flores Ex., Ex. L, ¶ 28).

The First FOIA Request listed eighteen (18) requests in four categories : (i) "All records and information pertaining to the legal basis of prosecuting activists, who engage in protests" ; (ii) "All records and information created on or after Nov. 12, 2010, pertaining to the legal basis for the arrest and/or prosecution of Lt. Choi" ; (iii) "All records and information created on or after Nov. 12, 2010, pertaining to the legal basis for the Department of Justice or U.S. Attorney's Office to fail to refer to Lt. Choi by his military rank, in accordance with Army Regulation 670-1" ; and (iv) "The total cost of the prosecution of Lt. Choi." (Dkt. No. 12, Ex. A to Ex. I of Ex. C). (PL 56.1 Answer ¶ 8). The requests speak to something

fundamental to democracy : that citizens should be able to meet, discuss their Government, organise, and participate in seeking passage of just laws or seeking the overturning of unjust laws by petitioning for a redress of grievances — citizen activities enshrined as freedoms in the First Amendment. Only when the public can know what are the Government's guidelines, procedures, policies, and/or protocols for the prosecution of the activists can the public know that the Government believes that citizens have a right in participating in their own Government.

At issue here are four core questions : (a) whether the Government comply with FOIA at its sole discretion ; (b) whether the Government can refuse to confirm or deny the very existence of guidelines, procedures, policies, and/or protocols for the prosecution of the activists ; (c) whether documents acknowledged to exist or are likely to exist, which form the basis of legal analysis, has come to be the Government's "working law" and therefore must be released under FOIA ; and (d) whether substantial public interest in guaranteeing the press's and the citizen's rights to First Amendment-protected activities compel the Government to disclose records about the prosecution of the activists. And underlying those questions is a critical threshold issue : whether the

Government can withhold records for which it has not invoked FOIA's Exemptions.

The DOJ has failed to make its case. There is no legal or factual basis for its decision to comply with FOIA at its discretion. It cannot justify denying the public access to that analysis when that analysis has become the effective law governing the prosecution of activists and the subject of repeated public disclosures by the top Law Enforcement Officers of the Nation.

VIII. ARGUMENT

This Appeal is about the First FOIA Request made by Appellant-Plaintiff under FOIA. The issues on Appeal will, more or less, follow the arguments made in Plaintiff's Objection to the Report and Recommendation of the Chief Magisrate Judge **ROANNE MANNE**, which were not fully addressed in the District Court's Judgment, as written on Order by the Hon. U.S. District Court Judge **JOAN AZRACK**.

A. THE GOVERNMENT HAS FAILED TO DEMONSTRATE WHY IT CAN COMPLY WITH FOIA AT ITS DISCRETION

1. The Government's Misconduct Have Wrongly Allowed The Government To Violate FOIA

The DOJ has a duty to comply with FOIA. For two years, the DOJ was never in compliance with FOIA, violations which were noted in

the Complaint. (Dkt. No. 1, ¶ 8). Plaintiff complained to the District Court in the Joint Status Report about the "DOJ's erroneous assertion that the DOJ can disclose records under FOIA at its own discretion." (Dkt. No. 18 at 2). However, the DOJ has, though its actions, treated FOIA as a law with which it could comply at its sole discretion, like when the DOJ plainly admitted in the filing of its Answer before the District Court that the DOJ "has not yet released any records that are responsive to Plaintiff's FOIA request at issue in this action and has not yet provided an explanation to Plaintiff." (Dkt. No. 9, ¶ 27). Other misconduct, such as submitted altered documents ; conducting unlawful searches ; the making of misrepresentations, including that no responsive records existed despite the production of responsive records upon further searches ; and the deliberate withholding of information from the District Court, were amongs the subjects of Plaintiff's Motion for Sanctions. (Dkt. No. 25). Plaintiff-Appellant incorporates by reference herein all of the allegations made in the Motion for Sanctions. Plaintiff's assertions of this misconduct were never given any weight by the District Court.

Firstly, the District Court did not fully consider Plaintiff's allegations that Defendant withheld documents from the FOIA Responses. (Dkt. No. 50 at 11-5). When the DOJ produced the Red Herring Response

under cover letter dated 19 August 2015, the DOJ represented that, "This is the final action on the above-numbered request." (Flores Decl., Dkt. No. 24, Ex. F at 1). Then, the DOJ produced the Declaration of **PRINCIPA STONE**, dated 30 September 2015, stating, in part, that, "no records responsive" to the First FOIA Request "had been located …. ." (Stone Decl., ¶ 9) Later, the DOJ produced at least some records that were responsive to the First FOIA Request, like, for example, when the DOJ produced the "Myers memo (email)" and "Capt. Guddemi's November 22 email." (Flores Decl., Ex. G at Tabs A and B). Additionally, the DOJ produced other responsive records that indicated that when local prosecutors drop charges or fail to bring charges against activists, the U.S. Attorneys' Office must make a prosecutive determination in respect of bringing Federal criminal charges against activists. (Flores Decl., Ex. G at Tab D). See *U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.881. The "Myers memo (email)," "Capt. Guddemi's November 22 email," and the section from the United States Attorneys' Manual were produced under cover letter dated 13 October 2015. (Flores Decl., Ex. G at Tab D at 1). In order to support its motion for summary judgment, the DOJ represented to the Court, in part, that, "Plaintiff's requested relief in the form of a response to his FOIA request is moot, as EOUSA has

provided a response" (Dkt. No. 20 at 4). But it was never a complete response. Still yet later, the DOJ admitted it possessed still more records when it filed the Declaration of Daniel Van Horn. (Van Horn Decl.). Even though the DOJ revealed that it kept discovering records, despite its misconduct in making representations that no records existed, the District Court took no action to press the DOJ to produce records that where referred to exist or were likely to exit, which will be discussed below.

Secondly, the DOJ never accounted for how it could have misplaced the original file for the First FOIA Request when it acknowledged having correspondence that would have belonged in the original file for the First FOIA Request. The FOIA Request Number being used by the DOJ at the time of the making of the Red Herring Response was : FOIA-2015-02422 with a Date of Receipt of 27 May 2015, according to the Red Herring Response. (Flores Decl., Dkt. No. 24, Ex. F at 1). In the DOJ's Answer, the DOJ admitted that it had records of the FOIA Appeal. (Dkt. 9, ¶ 6). The FOIA Appeal was made using the original FOIA Request Number, which the OIP later acknowledged. (Flores Decl., Dkt. No. 24, Ex. F at 1-2). Despite these inconsistencies, the District Court made no issue out of the misrepresentations made by the DOJ when it claimed that it

misplaced the original file for the First FOIA Request. The DOJ apparently just closed out the original request and the FOIA Appeal. (Flores Decl., Ex. D at 2). (Stone Decl. ¶ 5). Later, the DOJ opened a new request for the First FOIA Request, after the proceedings commenced before the District Court (2015-02422). (Stone Decl. ¶ 6). (Kelly Decl. ¶ 3). Plaintiff asserts that by closing out the original request, the DOJ was attempting to ringfence DOJ officials, who never answered the First FOIA Request, from having to provide Declarations about their acts of bad faith before the District Court.

Plaintiff showed that records existed and/or were highly likely to exist. Plaintiff asserted that a *Vaughn* Index was owed for withheld documents. (Dkt. No. 12, Ex. A at 2, B at ¶ 46). (Flores Decl., Ex. I at ¶ 4(j)(ii)). Yet, the District Court refused to compel Defendant to disclose the records and indicies. The District Court also ignored issues of redaction. Plaintiff requested that the DOJ provide clarification about the redactions in the "Myers memo (email)" and in "Capt. Guddemi's November 22 email." (Flores Decl., Ex. I at ¶ 4(b)(ii), (c)(ii)). But the DOJ would not address the issue of the redactions in Defendant's Incomplete Due Diligence Response. (Singh Decl., Ex. N). And the Judgement of the District Court ignored these issues.

By denying Plaintiff records that were shown to exist or were highly likely to exist or to explain or reveal redactions, the District Court effectively weakened FOIA, thereby allowing Defendant-Respondent to continue its pattern and practise of violating FOIA with impunity until the makers of FOIA requests commenced litigation to compel the Agency to comply with FOIA. (Dkt. No; 50 at 30-5). The Judgement of the District Court ignored these issues. This Court must reject this kind of jurisprudence.

2. Documents shown to exist or are likely to exist set forth the Government's "Working Law" on the prosecution of activists.

The DOJ has a duty to comply with FOIA, but it was never in compliance with FOIA. The District Court erred by refusing to consider that Defendant is obligated under FOIA to disclose its working law. (Dkt. No. 50 at 21-3). It it settled common law that Government Agencies must disclose their working law. Despite the limited disclosures made by Defendant-Respondent, Plaintiff-Appellant showed that working law existed. We know from the few responsive records produced by the DOJ that when the Federal Bureau of Investigation ("FBI") begins an investigation of activists under one of the DOJ's guidelines, the FBI will consult with an U.S. Attorney. Investigative decisions are made by U.S.

Attorneys. (Flores Decl., Ex. G at Tab D). *See U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.881. Decisions, determinations, and interpretations of laws that lead to the prosecution of activists are records responsive to the First FOIA Request, because this would be working law, or agency law, and records should have been ordered produced, but they were not.

In another instance, Plaintiff showed that Defendant follows legal guidance issued by the U.S. Department of State. *Id*. In Plaintiff's memorandum in opposition to Defendant's motion for summary judgement, Plaintiff argued that the guidance provided by the Department of State to the DOJ under § 9-65.881 of the United States Attorneys' Manual applicable to "demonstrations" was responsive to the First FOIA Request. (Dkt. No. 24 at 37). Later, the Court ordered that the DOJ conduct a search for records regarding the term " 'demonstration' and variants thereof." (Dkt. No. 37 at 2). Under that Order, the DOJ should have produced the legal advice from the Department of State. Despite Plaintiff's argument and that Court Order, the DOJ refused to produce the communication from the Department of State that determines why "most conduct in possible violation of [18 U.S.C. § 970] is more appropriate for disposition under local law." *See U.S. Dep't of*

Justice, United States Attorneys' Manual § 9-65.881. Because presumably the legal analysis in the Department of State memorandum involves the prosecution of activists, the Department of State memorandum has become the Government's working law and thus must be disclosed under FOIA. Despite demands made by Plaintiff that Defendant was required to disclose its working law, the District Court refused to compel Defendant to disclose its working law. This Court cannot allow this to stand.

Similarly, if the "Myers memo (email)" and "Capt. Guddemi's November 22 email" exist for Lt. Choi, then other working law records must exist for similarly situated activists. That working law should have been produced, but was not. Moreover, under a related section of the Federal Proscutors' manual, a U.S. Attorney will make a legal determination whether to prosecute activists. See *U.S. Dep't of Justice*, United States Attorneys' Manual § 9-65.882. These acknowledgements defeat the Government's ability to maintain its *Glomar*-equivalent response with respect to the line-items in the First FOIA Request, particularly in respect of the first sub-item under request 1.10. (The DOJ's *Glomar* response will be addressed below.) Thus, it is substantively questionable that the DOJ is accurate when it asserted that there were no responsive records. (Dkt. No. 20 at 5).

Since there is evidence in the record from which a reasonable inference could be drawn in favor of the non-movant on a material issue of fact, namely the existence of additional documents that were never produced, summary judgment was improper. *See Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28, 33 (2d Cir. 1997). Furthermore, the Court must compel the DOJ to produce records being created by §§ 9-65.881-82, and all other similar sections, of the United States Attorneys' Manual, and *Vaughn* Indices are owed for withheld documents. Since the Judgement of the District Court ignored issues about the impropriety of summary judgment, this Court must overturn the District Court's Judgment.

The District Court also erred by ruling that good faith searches were made, particularly since Defendant did not disclose its working law. (Dkt. No; 50 at 24-30). The only way it was possible for the District Court to rule that good faith searches were made was by ignoring with prejudice evidence presented by *pro se* Plaintiff. Upon a proper review of the facts (undisputed or those never established) and evidence, it was shown that Defendant withheld records, despite the fact that Defendant never invoked Exemptions for numerous records that it admitted existed or that Plaintiff showed were highly likely to exist. The

withholding of working law and the failure to invoke Exemptions took place after top Law Enforcement Officers claimed that citizens could engage in activism. Of particular note was the District Court's error to deny Plaintiff records once it had ruled in Plaintiff's favour at the Initial Conference — the only instance the District Court ever materially ruled in Plaintiff's favour.[3/] And the Judgement of the District Court ignored these issues.

For example, the Chief Magistrate Judge noted in the Report and Recommendation that, ". . . [I]t is settled law that delayed responses to FOIA requests do not, without more, establish bad faith, see *Amnesty Int'l*, 2008 WL 2519908, at *9 (citing *Meeropol*, 790 F.2d at 952) . . . ." *Id*. at 30. However, the fact pattern in *Meeropol v. Meese* was substantively different from this litigation. In the opinion in *Meeropol*, the D.C. Circuit Court

---

[3/] The Court's ruling in favour of Plaintiff carries significant weight. The Court of Appeals for the District of Columbia has ruled that " 'agencies [may] not make new exemption claims to a district court after the judge has ruled in the other party's favor,' nor may they 'wait until appeal to raise additional claims of exemption or additional rationales for the same claim.' " *Senate of P.R. v. DOJ*, 823 F.2d 574, 580 (D.C. Cir. 1987) (quoting *Holy Spirit Ass'n v. CIA*, 636 F.2d 838, 846 (D.C. Cir. 1980)). See also *Tax Analysts v. IRS*, 152 F. Supp. 2d 1, 25-26 (D.D.C. 2001) (refusing to revisit issue of attorney-client privilege, because the Court ruled on attorney-client privilege issue in previous opinion), aff'd in pertinent part, rev'd in part, 294 F.3d 71 (D.C. Cir.).

excused the agency's failure to comply with FOIA, because the FOIA request that was the subject matter of that case "was perhaps the most extensive FOIA request ever made" at that time then and because "the FBI in 1975 lacked experience implementing FOIA and the 1974 FOIA amendments."[4/] *See Meeropol v. Meese*, 790 F.2d 942 (D.C. Cir. 1986). In this day and age, the DOJ is highly experienced with FOIA, so much so, that it exploits FOIA to delay compliance and to use the Courts to make the process "protracted" for Plaintiffs, as with Plaintiff in this litigation. Factually, the Court must consider the differences in conditions faced by the Agency. Since the Agency did not face disadvantages processing the First FOIA Request as a consequence of the Agency's unlawfully narrow reading of the First FOIA Request and because the Agency is more experienced with FOIA, the Agency has no excuse under common law to explain away its failure to comply with FOIA, and the Chief Magistrate Judge erred by not considering the different fact patterns between the DOJ of 1975 and the DOJ of 2016. Because the Chief Magistrate Judge did

---

[4/] Since Plaintiff can only access reported cases through Google searches, Plaintiff is unable to provide a proper citation to the actual pages where these quotes are printed. *See Michael MEEROPOL, a/k/a Rosenberg, et al., Appellants v. Edwin MEESE III, Attorney General of the United States, et al.*, Open Jurist, http://openjurist.org/790/f2d/942/meeropol-v-meese-iii.

not consider the DOJ's expertise and experience with FOIA in the time since *Meeropol*, the Court must reject the Judgment that affirmed the adoption of the Report and Recommendation.

3. The Government Never Claimed Any Exemptions For Withholding Records That Exist Or Are Likely To Exist

Two years after the First FOIA Request was sent to the DOJ, it is notable that, in the DOJ's Answer filed with the District Court, the DOJ never invoked an Exemption under FOIA as a reason why it never provided an "explanation" to Plaintiff for why it had not yet "released any records that are responsive to Plaintiff's FOIA request." (Dkt. No. 9 ¶ 27). The only documents known to Plaintiff that were withheld due to the claiming of an Exemption were those documents withheld from the Red Herring Response due to the Privacy Act rights of Lt. Choi. (Flores Decl., Dkt. No. 24, Ex. F at 1).

In conjunction with the Government's failure to cliam any Exemption for records shown to exist or likely to exist was the Government's refusal to acknowledge the existence of records. Plaintiff claimed that Government was invoking a *Glomar* response. (Dkt. No. 24 at 12-20). (Dkt. No; 50 at 11-5). The Government has acknowledged procedures that likely have records about the prosecution of activists, but

the DOJ has been unwilling to acknowledge the existence of documents responsive to the First FOIA Request, and the DOJ provided a No Number, No List response for records it withheld from the Red Herring Response. This kind of a response evokes a *Glomar* response. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). The Government's *Glomar*-equivalent response and No Number, No List response were unlawful, because the DOJ later officially acknowledged the information Plaintiff seeks, and because Plaintiff seeks judicial records under FOIA and the First Amendment. At least some of these issues were argued by Plaintiff-Appellant in District Court. (Dkt. No. 24 at 12-20). The First Amendment argument for judicial records was also argued during the Initial Conference of the Parties before the District Court. Unfortunately, this Court denied Plaintiff-Appellant the ability to receive at no cost a transcript of the Initial Conference, thus denying Plaintiff-Appellant the ability to make and cite legal arguments herein about the First Amendment discussions had during the Initial Conference. Finally, since top Law Enforcement Officers have acknowledged that citizens have a right to engage in activism, the DOJ should neither be allowed to treat FOIA as a law with which it can comply at its discretion nor refuse to confirm or deny the existence of responsive records.

B. VIOLATIONS OF CIVIL PROCEDURE OR FAULTY INTERPRETATIONS OF THE LAW COMPONDED THE INJUSTICE IN THIS CASE AND ALLOWED THE GOVERNMENT TO VIOLATE FOIA AND THE FIRST AMENDMENT

1. Summary Judgment Was Improper.

The Chief Magistrate Judge did not set forth the relevant facts in the Report and Recommendation. (Dkt. No; 50 at 5-6). The Chief Magistrate Judge unjustly and narrowly construed the First FOIA Request. In the Report and Recommendation, the Chief Magistrate Judge acknowledged that the First FOIA Request was "extensive." (Dkt. No. 48 at 3). The First FOIA Request comprised 18 itemized requests. (Dkt. No. 12 at Ex. II to Ex. C). (PL 56.1 Answer, ¶ 8). Plaintiff has been seeking a complete itemized accounting by the DOJ for these 18 items. (Flores Decl., Ex. I at ¶ 1(i)). This request for itemization was also raised in the memorandum in support of Plaintiff's motion for partial summary judgment. (Dkt. No. 24 at 26). However, the Chief Magistrate Judge narrowly construed the requests to only number 4. (Dkt. No. 48 at 3). As a consequence of the District Court's adoption of the Report and Recommendation, deprived Plaintiff of the records that were expressly requested in writing. This Court cannot allow this to stand.

Other exhibits and facts set forth by the Chief Magistrate Judge were prejudicial against Plaintiff's arguments. Plaintiff-Appellant draws the Court's attention to one of the Government's Exhibits, one which purports to be a hardcopy of Plaintiff's e-mail transmitting the electronic copy of the First FOIA Request. (Singh Decl., Ex. F). The Court will note that this copy, which was sworn to be "a true and correct copy" by Counsel for the DOJ, is lacking or was stripped of any indication that an electronic copy of the First FOIA Request was attached, as is normally indicated in hardcopy print-outs of e-mails with attachments. *See, e.g.*, Flores Decl., Ex. JJ, which is the whole document (showing that an attachment was included in the e-mail). The Court will note that the DOJ acknowledged receiving a copy of the e-mail attached to which was the First FOIA Request. (Flores Decl., Ex. RR). Because the Chief Magistrate Judge chose to cite the Government's incomplete copy of Plaintiff's Counsel's FOIA Appeal in the Report and Recommendation, the District Court, in reviewing the Report and Recommendation, referred to an incomplete document. (Dkt. No. 48 at 3, n.1). The Judgement of the District Court ignored any issues, including the fact that the credibility of some of the Government's documents were in question due to their incompleteness.

The District Court further erred by ruling that Defendant met the legal standard for summary judgment. (Dkt. No; 50 at 9-11). The Chief Magistrate Judge ignored the absence of facts and genuine disputes of material facts. Numerous facts were not available in this case, as noted in Plaintiff's 56.1 Answer and in Plaintiff's Declaration. *See, e.g.*, PL 56.1 Answer ¶¶ 13, 25, 27-28, 32-38, 43, 46-50, 53-55, 75, and 81. *See also* Flores Decl., ¶¶ 4(A)-(P). Plaintiff also disputed, contested, objected, or dispelled various aspects of Defendant's 56.1 Statement. *See, e.g.*, PL 56.1 Answer ¶¶ 2, 7-10, 14, 16-17, 20, 23-24, 26, 29-31, 39-41, 43-45, 51-52, 59-63, 65, 79-80, and 82-83. And Plaintiff noted multiple issues with the Declarations the DOJ relied upon to initiate dispotive motion practise. (Flores Decl., Ex. I ¶¶ 1-2). In evaluation Defendant's Motion for Summary Judgment, the Chief Magistrate Judge resolved all ambiguities and reasonable inferences against the non-moving party, ignoring evidence in the record from which reasonable inferences could have been drawn in favour of the non-moving party. In dispositive motion practice, if a nonmovant shows that facts are unavailable to the nonmovant, then the Court may : "(1) defer considering the motion or deny it ; (2) allow time to obtain affidavits or declarations or to take discovery ; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d). Most troubling was

the District Court's willful ignorance that Plaintiff was unable to present facts essential to justify Plaintiff's opposition, a violation of civil procedure, because the District Court did not act accordingly.

2. The Report and Recommendation was based on the Chief Magistrate Judge's findings about records that were never produced.

Principally troubling was how the Chief Magistrate ruled about the content of records that were never produced. The position of the Chief Magistrate Judge was that Plaintiff conceded that the provision of one of the sections from the United States Attorneys' Manual only related to the property owned by foreign Governments. (Dkt. No. 48 at 13). This was untrue. Plaintiff plainly stated that that kind of conclusion could not be made, because Plaintiff said during Oral Arguments that, "Actually, I don't know, because I don't know what the Department of State legal guidance says." Transcript of Proceedings Held on July 11, 2016 (July 25, 2016) ("7/11/16 Tr."). (Dkt. No. 35 at 31:12–25). The Chief Magistrate Judge reached conclusions about records likely being created from procedures noted in sections from the United States Attorneys' Manual without the benefit of even conducting an inquiry of Defendant and without knowing or seeing what the Department of State legal guidance said. "The same is true of other supposedly responsive

documents identified by [P]laintiff, . . . none of which contains policy guidelines concerning the prosecution of activists, and all of which have now been produced to [P]laintiff in any case" . . . . (Dkt. No. 48 at 28). The Chief Magistrate Judge cited case law for this conclusion, but the Chief Magistrate Judge did not cite anything in the records that shows that such documents were produced.

How the Chief Magistrate Judge could make findings about what the legal guidance from the Department of State could say, or whether or not there were records that were likely being created by the relevant sections from the United States Attorneys' Manual, without having a chance to inspect the legal guidance — all without conducting an inquiry — is not known. The Judgement of the District Court ignored these issues.

3. Serious Questions before the District Court Could Have Been Resolved by Conducting Limited Discovery, But That Never Happened.

The District Court placed Plaintiff at a disadvantage by denying Plaintiff's request to conduct limited Discovery. (Dkt. No; 50 at 15-21). The Chief Magistrate Judge blamed Plaintiff for failing to show that Defendant was engaged in a pattern and practise of violating FOIA, but Plaintiff was unable to make such a complete showing, because the

Chief Magistrate Judge denied Plaintiff's requests to conduct limited Discovery. Ironically, the conduct of limited Discovery is provided for under Rule 56(d), which the District Court apparently did not heed. Fed. R. Civ. P. 56(d). The ability to conduct limited Discovery was essential for Plaintiff to obtain necessary information to expose the DOJ's misconduct and to support Plaintiff's Motion for Sanctions. What did the EOUSA officials know about what really happened with the original file for the First FOIA Request ? Why didn't Assistant U.S. Attorney **ANGELA GEORGE** tell anybody, much less the District Court, that she had received the First FOIA Request in an e-mail ? Given the DOJ's lack of credibility on FOIA, why did the District Court not permit Plaintiff to conduct limited Discovery on the DOJ ? These, and other burning issues, were outright ignored by the District Court.

Despite the limitations placed on Plaintiff's ability to conduct limited Discovery, Plaintiff kept bringing to the District Court's attention the fact that the DOJ has a pattern and practice of violating FOIA until the makers of FOIA Requests commenced litigation to compel Agency compliance.[5/] For example, the Chief Magistrate Judge thrice

---

[5/] *See, e.g.*, *Hadas Gold, NYT, Vice, Mother Jones top FOIA suits*, Politico (Dec. 23, 2014), http://www.politico.com/blogs/media/2014/

maintained in the Report and Recommendation that an Agency need not look beyond "the four corners" of a FOIA request in conducting its search and preparing its response. (Dkt. No. 48 at 20, 22-3 at n. 12, and 30). But Plaintiff repeatedly protested the inadequacies, sometimes deliberate, of the DOJ's searches and responses. The DOJ has not provided an itemised search of all of the 18 request items within "the four corners" of the First FOIA Request, and the Chief Magistrate Judge knew that. (PL 56.1 Answer, ¶ 8.1). How did the Chief Magistrate Judge invoke a boundary of "the four corners" of a FOIA request, when the DOJ didn't even respect "the four corners" ? Additionally, Plaintiff had to fight during dispositive motion practise to compel for searches using terms that began to approach the nature of the First FOIA Request. (Dkt. No. 37 at 2, n. 1). Despite all the many ways that the initial searches conducted by the DOJ were inadequate and unlawful, the District Court ignored these issues.

The District Court also erred by ruling that Defendant did not have to produce records about costs. (Dkt. No; 50 at 23-4). In another example of the District Court's bias against *pro se* Plaintiff, the Chief Magistrate Judge erroneously ruled that Defendant did not have to

---

12/nyt-vice-mother-jones-top-foia-suits- 200325.html (noting that the top defendant was the DOJ).

disclose costs for which Defendant acknowledged records existed. (Dkt. No. 48 at 29-30). Even though Plaintiff offered to accept some records of costs as a compromise, so that information about costs could be disclosed, the Report and Recommendation sided on every issue with Defendant, denying Plaintiff any records of costs that could have been offered as a compromise for the records that were expressly requested in the First FOIA Request. And the Judgement of the District Court ignored these issues.

4. The District Court's Judgment Weakens not only FOIA, but the First Amendment, as well.

The District Court did not consider the devastating implications on the First Amendment when Defendant does not comply with FOIA. (Dkt. No; 50 at 35-7). Because journalists rely on FOIA Requests to obtain Government records with which to write original news articles, the District Court's ruling allows Defendant to deny journalists records. Such denial of records, in violation of FOIA, act to restrain the freedom of the press, constituting prior restraint. *Near v. Minnesota*, 283 U.S. 697 (1931). This Court cannot allow these conditions to stand.

The position of the Chief Magistrate Judge has given short shrift to the First Amendment issues in this litigation. The Chief Magistrate Judge faulted Plaintiff for failing to describe how records being

sought, including the "secret DOJ memo" (a/k/a the legal guidance from the Department of State), "constitute a judicial document." (Dkt. No. 48 at 32, n.19). The documents Plaintiff seeks are judicial records in that these records provide guidance for charging activists in judicial proceedings, and it is beyond dispute that the public has a right to access judicial documents, generally, and this right is protected by the First Amendment. *See United States v. Erie Cnty.*, 763 F.3d 235, 239 (2d Cir. 2014).

Plaintiff is appearing *pro se* in this litigation, and the precise legal research and citations escape his reach. However, it is must be plainly evident to the Court that during criminal proceedings, the Defense generally can conduct Discovery of investigators to determine the nature of evidence used against Defendants, and this includes investigators' interpretations of the evidence and the law. For example, when the DOJ recently restaffed the reported civil rights investigation of the homicide of **ERIC GARNER**, *The New York Times* revealed that the reported target of the investigation would be able to call as witnesses investigators to testify about "their interpretations of the evidence."[6/] Therefore, any DOJ

6/ *See* Alan Feuer, *Staffing Change in Eric Garner Inquiry Pushes It Into 'Strange Territory,'* The New York Times (Oct. 25, 2016), http://www.nytimes.com/2016/10/26/nyregion/staffing-

documents that establish the predicate for the filing of criminal charges against activists — and that includes the legal guidance from the Department of State to the DOJ — would receive treatment as judicial records in a criminal proceeding, and it is under the First Amendment treatment of those records that Plaintiff seeks such records. *See United States v. Erie Cnty.*, 763 F.3d 235, 240 or 241 (2d Cir. 2014) (noting that, a District Court has "inherent 'supervisory power over its own records and files,' *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), even the District Court's inaction is subject to public accountability. The public's ability to scrutinize such judicial decision-making helps assure its confidence in the orderly administration of justice."). Under this First Amendment legal theory of judicial records or judicial documents, Plaintiff requests the documents.

Congress enacted FOIA to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). As was noted a YouTube video as part of Plaintiff-Appellant's activism campaign

---

change-in-eric-garner-inquiry-pushes-it-into-strange-territory.html.

to pressure the DOJ to process the First FOIA Request, political speech is a freedom guaranteed as a protection in the First Amendment to the U.S. Constitution. In the YouTube video, it was noted that when the DOJ does not honor FOIA requests, this failure acts to curtail free speech, because the failure denies citizens information about the government's conduct, consequently preventing citizens from meaningfully forming informed speech, from meaningfully assembling to discuss the government's conduct, and to petition their government for a redress of grievances.[7/] The Judgement of the District Court ignored all First Amendment issues, including detriments to a free press and to a citizenry fully participating in matters of their own governance. Yet, this Court must ask itself : How are the citizenry to know when the Government considers activism, or citizen participation in matters of their own governance, a crime, if the DOJ refused to release all the records responsive to the First FOIA Request ?

The District Court refused to consider wrongdoing by Defendant, and, instead, the District Court wrongly showed bias against *pro se* Plaintiff. (Dkt. No; 50 at 37-8). Ultimately, Plaintiff-Appellant was

---

7/ *See Louis Flores*, Twitter (Feb. 25, 2014, 4:24 PM EST), https://twitter.com/maslowsneeds/status/438424392977375232.

forced to file ethics complaints against two Assistant U.S. Attorneys over allegations of misconduct during the proceedings before the District Court, allegations of misconduct that the District Court wholly ignored.[8/] Because of the bias shown against *pro se* Plaintiff, the District Court was not impartial in the issuing of the Report and Recommendation and in the Judgment. And the District Court ignored these issues.

There were other procedural errors prior to the issuance of the Report and Recommendation, which the District Court ignored. According to Rule 56(h), if a party is found to have submitted an affidavit or declaration during dispositive motion practise in bad faith or solely for delay, "An offending party or attorney may ... be held in contempt or subjected to other appropriate sanctions" by the Court. Fed. R. Civ. P. 56(h). Yet, the District Court refused to consider Rule 56(h) for additional legal authority available to the Court to find that the Declaration of Daniel Van Horn was submitted to the Court in bad faith. Rule 56(h) is also available to the Court to address the suspect exhibit submitted into the record in the Declaration of Rukhsanah Singh, an issue

---

[8/] *See* Louis Flores, *Ethics complaints were filed against Federal prosecutors over alleged misconduct in FOIA lawsuit*, Progress Queens (Mar. 3, 2017), http://www.progressqueens.com/news/2017/3/3/ethics-complaints-were-filed-against-federal-prosecutors-over-alleged-misconduct-in-foia-lawsuit.

raised in Plaintiff memorandum for sanctions. (Dkt. No. 25 at 34). Yet, the Judgment of the District Court just swept all the issues with the Declarations under the rug.

Furthermore, according to Rule 58(c)(2)(B), the Court must enter an order within 150 days of an entry in the docket. Fed. R. Civ. P. 58(c)(2)(B). Yet, for unknown reasons, the Court chose to allow the DOJ to initiate dispositive motion practise without having addressed legal issues raised by Plaintiff once Plaintiff received the Second FOIA Response and the Declarations supporting the DOJ's dispositive motion. (Dkt. No; 43 at 9-10). In the Joint Reportback to the Court, the DOJ admitted that it was not going to comply with FOIA voluntarily without Court orders when it said, "Defendant, accordingly, believes that motion practice is necessary and does not believe that further meet and confers would be an efficient use of the parties' time and resources at this time." (Dkt. No. 18). Because Plaintiff filed surreplies on 25 February 2016, Plaintiff respectfully requested that the District Court issue its over due report of recommendations, because the District Court did not appear to Plaintiff to be in compliance with Rule 58(c)(2)(B). During proceedings, the District Court chastised Plaintiff for the protracted litigation, but the District Court itself dragged out the proceedings by not complying with

Rule 58(c)(2)(B). But it was not Plaintiff's fault for seeking justice from the District Court — it was the DOJ's fault for violating FOIA and for remaining out of compliance with FOIA. The record is clear that this is the Government's legal strategy with respect to FOIA. (Flores Decl., Ex. BB-GG). And as Plaintiff has asserted over and over again, the DOJ will only produce records at the discretion of the Courts.

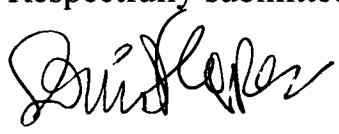
Because the District Court showed a determined effort to rule against Plaintiff during motion practise on every issue that was raised, this Court must reverse the Judgement entered by the District Court.

IX. CONCLUSION

Plaintiff-Appellant respectfully asks this Court reverse the Judgment of the District court with a finding of fact in favour of Plaintiff-Appellant. In the alternative, the Court should remand the case for a fair review of the case with equal weight given to the evidence and the Affidavits submitted by Plaintiff-Appellant and under correct instructions by this Court as is just and proper. In any case, this Court must address : (a) whether the Government may comply with FOIA at its sole discretion ; (b) whether the Government may refuse to confirm or deny the very existence of guidelines, procedures, policies, and/or protocols for the prosecution of the activists, (c) whether legal analysis of the prosecution

of activists become the Government's "working law" and thus must be disclosed under FOIA when : (i) that analysis describes the process that Agencies must follow in order for their actions to be legal and (ii) executive officials have repeatedly stressed the legality of activists engaged in activism, and (d) whether substantial public interest in guaranteeing the press's and the citizen's rights to First Amendment-protected activities compel the Government to disclose its guidelines, procedures, policies, and/or protocols for the prosecution of the activists ?

Respectfully submitted,



Louis Flores, *Pro Se*
Plaintiff-Appellant

X. CERTIFICATE OF COMPLIANCE

I, **LOUIS FLORES**, declare under penalty of perjury that :

1/. The Brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B), because, excluding the parts of the documents exempted by Fed. R. App. P. 32(f), this document contains 8 166 words.

2/. These documents comply with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because these documents have been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in 14 pt. Cambria.

Respectfully submitted,

Louis Flores, *Pro Se*
Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LOUIS FLORES,

Appellant-Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent-Defendant.

EDNY : 15-CV-2627
2d Cir : 17-0428

CERTIFICATE OF SERVICE

I, **LOUIS FLORES**, declare under penalty of perjury that on **25 JULY 2017** I have served a copy of the attached document :

Brief of Appellant Louis Flores

by **E-MAIL ONLY** to : **rukhsanah.singh@usdoj.gov** on the following party at :

Rukhsanah Singh, Esq.,
c/o United States Attorney's Office - EDNY,
271-A Cadman Plaza East,
Brooklyn, New York 11201.

Dated : Jackson Heights, New York
25 July 2017

Louis Flores
34-21 77th Street, Apt. 406
Jackson Heights, New York 11372
Phone : (929) 279-2292
louisflores@louisflores.com